RECENT CASES

Bankruptcy—Claims against and Distribution of Estates—Provability of Claim for Liquidated Damages for Breach of Lease Made before Bankruptcy—Bankrupt had contracted to lease as tenant, for a period of ten years, a building belonging to petitioner, the lease reserving to the landlord the right of re-entry in case the building should be vacated because of any act of the tenant, who covenanted, in that event, to pay the difference between a new lease made by the landlord and the reserved rental, but not the difference between the reserved rental and the reasonable rental value. Bankrupt occupied for part of the term, until receivers were appointed who disaffirmed the lease and vacated the building. After the subsequent petition in bankruptcy, the landlord relet the property for less than the reserved rental, and presented a claim for the difference between the rent reserved and the fair rental value for the remainder of the term. *Held,* claim refused, upon the ground that it was uncertain at the time of filing the petition in bankruptcy whether any liability would ever arise under the covenant, to which petitioner is limited, since the premises had not at that time been relet. *Miller v. Irving Trust Co.,* U. S. L. Week, Dec. 10, 1935, at 24 (U. S. Sup. Ct. 1935).

In restricting petitioner to recovery under the covenant the Court reaffirmed the judicial policy of denying claims in bankruptcy for future rents,[1] although, as was pointed out in a previous issue of this REVIEW,[2] such claims are not so contingent as to be barred if of a different nature. The Court also repudiated the distinction made by the dissenting circuit judge in *Urban Properties, Inc. v. Irving Trust Co.*[3] between breach of the lease before and after bankruptcy. The problem has not yet been decided of how the courts will treat claims for future rents arising under the specific amendment allowing provability of future rents.[4]

Bonds—Gold Clause—Right of Holder of Obligation of Foreign Government Alternatively Payable in American Gold Coin—Suppliants held bonds issued in America by the British Government, of the face value of $1000, payable "at the option of the holder, either in . . . New York . . . in gold coin of the United States of America of the standard of weight and fineness existing February, 1917, or in . . . London, . . . in sterling money at a fixed rate of 4.86½ dollars to the pound." Joint Resolution of Congress, June 5, 1933, provided that all obligations payable in money of the United States "shall be discharged upon payment, dollar for dollar, in . . . legal tender."[1] Suppliants filed Petition of Right for declaration of their rights. *Held,* that the obligation of the British Government was to pay in London in sterling money at the agreed rate of exchange, calculated upon the face amount of the bond, the alternative obligation to pay in New York in American gold coin being discharged because of impossibility of performance. *Matter of International Trustee for Protection of Bondholders Aktiengesellschaft,* N. Y. L. J., Dec. 7, 1935 (K. B. 1935).

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1. See (1935) 83 U. OF PA. L. REV. 1021.
2. *Id.*
3. 74 F. (2d) 654 (C. C. A. 2d, 1935), *cert. granted,* 295 U. S. 725, but dismissed on petitioner's motion.
4. 47 STAT. 1468 (1933), 11 U. S. C. A. § 201 (a) (Supp. 1934).

1. 48 STAT. 112 (1933), 31 U. S. C. A. § 463 (Supp. 1934).

The court applied English law,[2] but examined American law (as promulgated by the United States Supreme Court in the *Gold Clause Cases*[3]), as well as circumstances surrounding the execution of the contract, as having a material bearing upon the intent of the contracting parties.[4] The conclusion reached was that the "gold clause" of the contract indicated an intention to pay in gold coin, rather than to use gold as a measure of value.[5] In reasoning thus, the court distinguished an important English case to a contrary effort,[6] ignored two much-quoted decisions of the World Court,[7] and relied upon an interpretation of the *Gold Clause Cases* which is questionable.[8] Having determined this vexatious question to its satisfaction, the court then proceeded to find that the Joint Resolution of Congress applied to foreign debtors—a view which has been followed in a recent New York decision [9]—and likewise to foreign sovereign debtors.[10] Thus, payment in the United States in American gold coin was considered impossible, thereby discharging one alternative method of performance, and leaving as the only possible performance payment in England in English currency. By this method, the court neatly side-stepped the problem as to whether or not a contract alternatively payable in America in gold dollars or abroad in a foreign currency is "payable in money of the United States" within the purview of the Joint

2. The general rule is that the obligation of a sovereign state is subject to the law of that state only, regardless of where the obligation was contracted, or where it was to be performed. See Smith v. Weguelin, L. R. 8 Eq. 196, 213 (1869); Goodwin v. Robarts, 1 App. Cas. 476, 495 (1876); Serbian Loan Case, Publications of the Permanent Court of International Justice, Series A, Nos. 20/21 (1929) at 42.

3. Norman v. Baltimore & Ohio R. R., 294 U. S. 240 (1935), 83 U. OF PA. L. REV. 682; Perry v. United States, 294 U. S. 330 (1935), 83 U. OF PA. L. REV. 686; Nortz v. United States, 294 U. S. 317 (1935), 83 U. OF PA. L. REV. 687.

4. Since the Gold Clause Cases were decided eighteen years after the bonds involved in the principal case were issued, they could have little bearing upon the intent of the parties, as the court in the principal case admitted.

5. "By the 'gold coin clause', the debtor is bound to pay in gold coin; in the case of a 'gold value clause' he has to pay in paper, or at his option, in any other currency an amount equal to the value of the gold coin fixed by the promise." Nussbaum, *Comparative and International Aspects of American Gold Clause Abrogation* (1934) 44 YALE L. J. 53, 55.

6. Feist v. Société Intercommunale Belge D'Électricité, [1934] A. C. 161, (1934) 82 U. OF PA. L. REV. 533, 15 BRIT. Y. B. INT. LAW 187 (1934) (holder of 100*l* bond payable in gold of 1928 weight and fineness, entitled to legal tender, equal to gold value of 100*l* of 1928 weight and fineness).

7. Serbian and Brazilian Loan Cases, Publications of the Permanent Court of International Justice, Series A, Nos. 20/21 (1929), 11 BRIT. Y. B. INT. LAW 203 (1930) (Frenchmen owning bonds of Serbian Government payable in "gold francs", entitled to legal tender equal in value to the specified amount of gold francs). One of the judges of the World Court when these decisions were rendered was Mr. Hughes, who later, as Chief Justice of the United States Supreme Court, delivered the majority opinion in the Gold Clause Cases.

8. American writers unanimously consider the Gold Clause Cases as adopting the "gold value" interpretation of the gold clauses. See Pennock, *The Private Bond Case as a Postponement of the Real Issue* (1935) 84 U. OF PA. L. REV. 194, 195, 209; Tolman, *Review of Recent Supreme Court Decisions* (1935) 21 A. B. A. J. 166, 167, 170; Dawson, *The Gold Clause Decisions* (1935) 33 MICH. L. REV. 647, 653, 662; Hart, *The Gold Clause in United States Bonds* (1935) 48 HARV. L. REV. 1057, 1060, 1080, 1082, 1084.

9. Compania de Inversiones Internacionales v. Industrial Mortgage Bank of Finland, 269 N. Y. 22 (1935). The Joint Resolution was held to apply to the obligation of a foreign defendant, on the ground that Congress intended to establish a *uniform* monetary system. Foreign decisions to the same effect were cited by the court (p. 32). A discussion of other foreign cases will be found in Nussbaum, *loc. cit. supra* note 5.

10. The principal case is the first to determine that the Joint Resolution is binding upon foreign *sovereign* debtors obligated to pay in America with American dollars. It is to be regretted that limited space will not permit more than a bare mention of this important phase of the decision.

Resolution—a question which has caused American courts to split.[11] Since the "gold content" of $1000 at the 1917 level is equal to that of $1693 in present-day dollars, suppliants contended that the rate of exchange should apply not to $1000, but to $1693. The court held that this argument was untenable.[12] In so deciding, it would seem to have disposed of the controversy, regardless of whether or not performance in America was deemed possible. The court's solution, based upon the ground that payment in English pounds was not intended to refer to the gyrations of the American dollar, seems consistent with common sense, particularly since the rate of exchange was fixed by the contract.[13]

Constitutional Law—Due Process—Validity of Amended Frazier-Lemke Amendment to Bankruptcy Act—An Illinois farmer mortgagor petitioned the court for appointment of a referee and trustee under amended subsection (s) of section 75 of the Bankruptcy Act, commonly called the Frazier-Lemke amendment,[1] which provides for continuance in possession of the debtor for three years; continuing liens on the property; payment of reasonable rental during the period of default; public sale of the property upon request of the creditor,[2] the debtor having ninety days thereafter in which to redeem; and lastly provides that the court may in its discretion liquidate the estate of the debtor if it appears to it that the state of emergency has ceased to exist in the locality.[3] *Held,* that the court would not assume jurisdiction, because the amended subsection involved a taking of existing rights in specific property, which constituted a violation of the Fifth Amendment, as well as a denial of full faith and credit to certain acts of the State of Illinois.[4] In re *Young,* 12 F. Supp. 30 (S. D. Ill. 1935).[5]

11. A bond issued in America calling for payment, at the holder's option, either in America in gold dollars, or abroad in foreign currencies, is within the meaning of the Joint Resolution, though the holder elected to demand payment abroad, when both parties are citizens of the United States. City Bank Farmers Trust Co. v. Bethlehem Steel Co., 244 App. Div. 634, 280 N. Y. Supp. 494 (1st Dep't 1935). *Contra:* McAdoo v. Southern Pac. Co., 10 F. Supp. 953 (N. D. Cal. 1935) (provided bondholder exercises option of making demand abroad). See (1935) 49 HARV. L. REV. 152.

12. As was observed by the court, under suppliants' contention, if the dollar depreciated fifty per cent while the pound remained constant, the amount of *undepreciated* English currency payable would automatically be doubled, a construction so unreasonable that it could not have been intended by the parties.

13. Logically, a *fixed* rate of exchange would probably apply to a *definite* number of dollars, whereas a *variable* rate of exchange would most likely apply to a *fluctuating* number of dollars.

1. Act of Aug. 28, 1935, c. 792, § 6, 11 U. S. C. A. § 203 (s) (Supp. 1935).

2. The act says nothing as to the *time* when this public sale may be enforced, and the mortgagor therefore argued that this meant that it could be effected at any time after the court took jurisdiction. It is clear, however, that this interpretation of the phrase would nullify the whole meaning of subsection (s), since the practical effect would be that the creditor would immediately demand a sale. The court properly took the view that the public sale could be effected at any time *after* the expiration of the extension period, and not before.

3. It has been suggested that a bankruptcy law operative in one part of the country and not in another would be unconstitutional, and that the amended subsection will have that effect if a court in one locality determines that the emergency has ceased to exist there and courts in other localities do not so determine. The basis of the unconstitutionality is argued to be a failure of geographical uniformity; but it would not appear that an essentially emergency measure that is limited in operation to localities where such an emergency exists is lacking in such uniformity. See A. B. A. J., Jan. 1936, p. 19.

4. ILL. REV. STAT. (Cahill, 1933) c. 77, pars. 16-20, providing for foreclosure and fixing the period of redemption. The court considered that these fixed the rights of the mortgagee, and that an act attempting to alter them would deny these acts full faith and credit.

5. See also, to the same effect, *In re* Sherman, 12 F. Supp. 297 (W. D. Va. 1935); *In re* Lowman, CCH Bank. Serv. No. 3680 (C. C. A. 7th, 1935).

The United States Supreme Court in *Louisville Joint Stock Land Bank v. Radford*[6] expressly declined to determine whether an act affording relief to defaulting mortgagors was a valid exercise of Congress' bankruptcy powers,[7] but held the original Frazier-Lemke amendment invalid solely on the ground that it violated the Fifth Amendment. The instant court likewise avoided the former question. It interpreted the *Radford* case as holding that *any* taking of existing rights in specific property by virtue of the bankruptcy power violates the Fifth Amendment. Although the language used might so indicate,[8] it is questionable whether that case goes so far. From the terms employed by the *Radford* case in distinguishing the earlier case of *Home Building and Loan Ass'n v. Blaisdell*,[9] it may be inferred that the true basis of distinction is the reasonableness of the legislation involved.[10] It is settled that states may pass moratory legislation if the rights of creditors are reasonably protected.[11] The most objectionable provisions of the earlier Frazier-Lemke amendment were those for redemption by the mortgagor upon payment of only the appraised price of the property, and for the arbitrary period of the time extension.[12] Those provisions have been abolished in the amended subsection. The instant court condemned the section because it deprived creditors of the right to determine when the sale of the property should take place, to control the property during the period of default, and to receive a final deed to the property upon the expiration of the period of redemption fixed by the state; the court refused to consider whether the means used were reasonably connected with the end, or were unduly harsh or arbitrary. But property rights have been taken away by another section of the Bankruptcy Act that is not mentioned.[13] It does not appear that any of the above rights are so fundamental that they need be considered inviolable.[14] The amended section would therefore appear to come within

6. 295 U. S. 555 (1935).

7. *Id.* at 589. It is apparent that the purpose of the present section is the benefitting of the debtor. It had heretofore been supposed that the purpose of the bankruptcy power was the composition of estates for the benefit of creditors, but the Court in the *Radford* case indicated that the limits of the power are not so narrow, and that a measure intended primarily for the relief of the debtor rather than for the creditor does not necessarily fall without those limits.

8. *Id.* at 589, 590. "But the effect of the Act here complained of is . . . the taking of substantive rights in specific property acquired by the Bank prior to the Act."

9. 290 U. S. 398 (1934).

10. The Court in the *Radford* case pointed out that the Minnesota Act provided for discretion in the court as to the length of the time extension, and that once fixed it could be reduced in case of a change of circumstances, while in the Frazier-Lemke amendment the period was arbitrarily fixed at five years. The Court stated, at page 595: "Strong evidence that the taking of these rights from the mortgagee effects a substantial impairment of the security is found. . . ." This would imply that it is the "substantial impairment" of the creditor's security rather the mere fact that some property rights are taken away, that is the chief objection to the act. This is the same as saying that it is because his rights are not reasonably safeguarded. On this general point see (1935) 83 U. OF PA. L. REV. 375, where the conclusion is reached that "the unreasonableness of the amendment becomes . . . the ultimate criterion."

11. See (1935) 83 U. OF PA. L. REV. 375, 376, n. 11.

12. The provision permitting the mortgagor to retain his property upon payment of the appraised price might be said to take from the mortgagee the very essence of his right; and an arbitrary period of five years for extending the time for foreclosure might extend what is deemed essentially an emergency measure long beyond the period of emergency.

13. The provision that transfers within four months of bankruptcy may be voided by the trustee in bankruptcy. 44 STAT. 666 (1926), 11 U. S. C. A. § 96 (Supp. 1934).

14. It would appear that the Minnesota Mortgage Moratorium Law takes away from the creditor the right to control the property during the period of extension, to the same extent as does the amended subsection here involved. Although one is a state, and the other a federal, act, the Fifth and Fourteenth Amendments are said to be identical in application as to due process. See Heiner v. Donnan, 285 U. S. 312, 326 (1932).

the boundaries set by the *Blaisdell* case, especially in view of the fact that the most fundamental differences between the Minnesota legislation and the former Frazier-Lemke amendment, as indicated by the Supreme Court, have been eradicated.

Constitutional Law—Federal Taxation under the General Welfare Clause—Constitutionality of the Agricultural Adjustment Act—The Agricultural Adjustment Act [1] declared the existence of a national emergency produced in part by the decline of agricultural prices. It provided for benefit payments to farmers to induce them to enter into contracts to curtail production. In order to meet these benefit payments and administrative expenses it further provided for a tax on the processing of certain agricultural commodities. The receivers of an insolvent processing corporation presented to the Court a report on a tax claim assessed pursuant to the Act. On appeal,[2] *held* (Stone, Cardozo and Brandeis, JJ., dissenting), that the Act was unconstitutional as an attempt to regulate by taxation agricultural prices and production, matters not within the delegated power of Congress. *United States v. Butler,* U. S. L. Week, Jan. 7, 1936, at 373 (U. S. Sup. Ct. 1936).

The most striking feature of the instant case was that, despite its invalidation of the government's agricultural program as beyond the power of Congress,[3] the Court purportedly adopted the Hamiltonian interpretation [4] of the federal taxing power under the general welfare clause,[5] a view which maintains that the power to tax to promote the general welfare is a substantive one, unrestricted in its application by the specifically enumerated powers.[6] Unfortunately the actual de-

1. 48 STAT. 31 *et seq.* (1933), 7 U. S. C. A. 601 *et seq.* (Supp. 1934), as amended by P. L. No. 320, 74th Cong., 1st Sess., 7 U. S. C. A. § 623 (Supp., Oct. 1935). The amendment was designed to obviate the criticism that the Act was invalid as an unconstitutional delegation of legislative power. The Court held that it was unnecessary, in view of its holding, to consider the effect of the amendment.

2. The Act was upheld in Franklin Process Co. v. Hoosac Mills Corp., 8 F. Supp. 552 (D. Mass. 1934) under the commerce clause, U. S. CONST. Art. I, § 8, cl. 3. This was reversed *sub nom.* Butler v. United States, 78 F. (2d) 1 (C. C. A. 1st, 1935) the Act being held unconstitutional as an invalid delegation of legislative power. See (1935) 83 U. OF PA. L. REV. 376, for a discussion of the decision in the district court.

3. The Court recognized that Congress might condition its appropriations on the beneficiary's compliance with its expressed policy [*cf.* Massachusetts v. Mellon, 262 U. S. 447 (1923)], but held that it could not condition them on the beneficiary's *contracting* to comply. This differentiation seems more apparent than real; for if an offer of a bilateral contract is "economic coercion" it would seem to follow that an offer of a unilateral contract also is.

4. For a discussion of the contrary views of Hamilton and Madison on this subject, see Corwin, *Constitutional Aspects of Federal Housing* (1935) 84 U. OF PA. L. REV. 131. Professor Corwin strongly espouses the Hamiltonian position. For a vigorous defense of the Madisonian view that the power to tax to promote the general welfare is limited by the enumerated powers (*i. e.,* is merely an "instrumental" as contrasted with a "substantive" power), see Post, *The Constitutionality of Government Spending for the General Welfare* (1935) 22 VA. L. REV. 1.

5. U. S. CONST. Art. I, § 8, cl. 1.

6. The Court in adopting the Hamiltonian view cited STORY, COMMENTARIES ON THE CONSTITUTION (5th ed. 1891) § 907. But Story recognized fully the implications of the Hamiltonian position; for in § 934 of the COMMENTARIES, in arguing in defense of the necessity for this interpretation, he says, "We may have internal commotions. We may suffer . . . from the gradual decline of particular sources of industry. . . . There ought to be a capacity to provide for future contingencies, as they may happen." And in refuting the contentions of his opponents that this view would destroy the State-Federal system he further states, in § 944: "And in respect to the particular subject of taxation, there is quite as much reason to suppose that there will be an adequate assemblage of experience, knowledge, skill and wisdom in Congress and as adequate means of ascertaining the proper bearing of all taxes, whether direct or indirect, whether affecting agriculture, commerce or manufactures, as to discharge any other functions delegated to Congress. To suppose otherwise is to suppose the Union impracticable or mischievous."

cision can scarcely be reconciled with this reasoning. For although the Court granted the Government's contention that the power to tax (and the correlative power to appropriate) to promote the general welfare was not limited by the enumerated powers, it expressly held that the power could not be exercised if it interfered with the reserved powers of the states.[7] But if Congress in utilizing its power to tax cannot encroach on the powers reserved to the states even where the general welfare is concerned, it would seem to follow that the only ends which Congress can promote by the use of this power are those within the scope of its delegated powers.

In other words, a substantive power delegated to Congress is limited in its exercise by the powers reserved to the states.[8] Thus the Court while purporting to adopt a liberal construction of the federal government's taxing power has in effect created merely an indefinite limitation on the exercise of this power, the extent of which is known only to the Court itself. The total effect is to introduce into the field of constitutional law the principle that the delegated powers of Congress are restricted by the reserved powers of the states—a principle as vague in its meaning as the due process clause,[9] and one which in its application will extend tremendously the influence of the Supreme Court, the only body deemed capable of ascertaining the proper limitations.[10] All this in a field of law where uncertainty results in the expediture of huge sums of money in the administration of what ultimately prove to be unconstitutional laws,[11] and in the disruption of an economic social structure geared over a period of several years to compliance with the ill-fated federal legislation.[12] The dangers inherent in such a situation might seem less real were they not so strongly expressed by the vigorous dissenting opinion of one-third of the Supreme Court.[13]

Constitutional Law—Full Faith and Credit—Divorce from Bed and Board in Sister State as Ground for Absolute Divorce—Defendant obtained a divorce *a mensa et thoro* from complainant in Virginia, the matrimonial domicile, following an appearance by complainant. Florida statutes made it a ground of divorce that "defendant has obtained a divorce from the complainant in any other State",[1] but abolished divorces *a mensa et thoro*.[2] Complainant, while

7. U. S. CONST. Amend. X. *Cf.* Plumley v. Massachusetts (The Oleomargarine Case), 155 U. S. 461 (1894).

8. This conclusion would seem more logical if the same Court had not already held that Congress in exercising its power to regulate interstate commerce, may, if necessary, also regulate intrastate commerce, a field which would otherwise seem clearly "reserved to the states." Houston, E. & W. Texas Ry. v. United States (The Shreveport Rate Case), 234 U. S. 342 (1914).

9. See Albertsworth, *The Mirage of Constitutionalism* (1935) 29 ILL. L. REV. 608, 613.

10. See CORWIN, THE TWILIGHT OF THE SUPREME COURT (1935); *cf.* ARNOLD, THE SYMBOLS OF GOVERNMENT (1935) 101.

11. The cost of administering the National Recovery Act, which was held unconstitutional in Schechter Poultry Corp. v. United States, 295 U. S. 495 (1935), is estimated to have been $55,000,000 a year. N. Y. Times, May 29, 1935, at 14.

12. Recognition of the necessity of providing an immediate substitute for the Agricultural Adjustment Act in order to prevent a collapse of the farmer's purchasing power, has created a problem of national concern. N. Y. Times, Jan. 8, 1936, at 1. The confusion is further enhanced by the Court's ruling that the taxes collected under the Act must be refunded to the processers. Rickert Rice Mills v. Fortenol, N. Y. Times, Jan. 14, 1936, at 10 (U. S. Sup. Ct. 1936).

13. "Courts are not the only agency of government that must be assumed to have capacity to govern." Stone, J., dissenting in the principal case. U. S. L. Week, Jan. 7, 1936, at 381.

1. FLA. COMP. GEN. LAWS (Skillman, 1928) § 4983 (8).

2. *Id.* § 4982 (8).

resident in Florida, thereafter sought a divorce *a vinculo matrimonii* in that state. *Held* that the divorce be granted, because full faith and credit must be given to the Virginia decree, and because the words, "divorce in any other State", of the quoted statute include divorce from bed and board. *Givens v. Givens,* 163 So. 574 (Fla. 1935).

The court's reliance on "full faith and credit" in a case making a divorce from bed and board the basis of a complete divorce suggests, at first, a serious misapplication of principle. Thus, if placed solely on the full faith and credit clause, the decision here would have contravened the rule that a foreign decree need not be given greater force than it has in the state where rendered.[3] Moreover, in the case of divorce decrees, the clause requires only that recognition be accorded the operation of the first decree as severing or suspending the marriage relation and establishing certain facts in regard thereto, and not that an additional decree be awarded.[4] Accordingly, even if a divorce *a mensa et thoro* had been available in Florida, and the court had determined to grant the foreign decree full faith and credit,[5] the proper method of recognition would have been to admit the effectiveness of the Virginia decree in Florida rather than to grant a new and superfluous divorce.[6] However, by deciding that the local statute, independently of the full faith and credit clause, required the giving of an absolute divorce when an effective foreign divorce from bed and board had been obtained, the court in the instant case avoided the above-discussed errors. On the remaining issue as to whether a *valid* divorce from bed and board had been granted in Virginia, full faith and credit was clearly applicable; *i. e.,* as the decree was not subject to collateral attack in Virginia,[7] Florida was bound to give it similar effect.[8] It may be, however, that the court misinterpreted the statute of its own state, in assuming that the foreign decree of divorce must be *valid* before it will constitute a ground of divorce within the Florida statute. The chief reason for making a foreign divorce the ground for a domestic divorce [9] would appear to be that the former—like adultery, desertion, *etc.*—indicates a rift in the marital relation so great that the relation may be justifiably terminated.[10] If such be the case, no distinction can properly be drawn between void and valid divorces, for the two are equally indicative of a break in the marriage tie. Therefore while the court expressed valid principles of "full faith and credit", application of those principles might have been totally unnecessary under a more accurate construction of the local statute.

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3. See Robertson v. Pickrell, 109 U. S. 608, 610 (1883).

4. Atherton v. Atherton, 181 U. S. 155 (1901); Harding v. Allen, 9 Me. 140 (1832); Pearson v. Pearson, 230 N. Y. 141, 129 N. E. 349 (1920); *cf.* Hood v. Hood, 110 Mass. 463 (1872).

5. *Cf.* 1 BEALE, CONFLICT OF LAWS (1935) § 114.1, where it is contended that ordering a divorce from bed and board is not a judicial act. But this would clearly not prevent the application of full faith and credit where, as in the principal case, all the requirements of jurisdiction were present. Harding v. Harding, 198 U. S. 317 (1905).

6. In logic the granting of a new divorce is a denial of the validity of the first one; *i. e.,* if the parties need a new decree in order to be divorced, the first decree must have failed to accomplish that purpose.

7. Gum v. Gum, 122 Va. 32, 94 S. E. 177 (1917).

8. Harding v. Harding, 198 U. S. 317 (1905); Thompson v. Thompson, 226 U. S. 551 (1913).

9. The social desirability of establishing such a ground for divorce is not within the scope of this discussion. Obviously, it has many questionable aspects. Thus, in the instant case, the husband was in one sense given a divorce because he had been adjudicated guilty of desertion in Virginia. Principal case at 575. If a complete divorce has been granted elsewhere, the inconsistencies would be increased. See note 6, *supra.*

10. *Cf.* Wright v. Wright, 24 Mich. 180 (1871). See also OHIO CODE (Baldwin, 1934) § 11979.

Constitutional Law—Full Faith and Credit to Ruling of Attorney General—Transfer of Liberty Bonds—Bank promoters persuaded complainant to deposit registered "non-negotiable" Liberty Bonds in *X* bank. Thereafter, for a consideration, she assigned the bonds in blank,[1] and authorized promoters to represent them as part of *Y* bank's paid-in capital, so that the state authorities would allow *Y* bank to open. Promoter borrowed on these bonds from defendant bank, and defaulted. Complainant sued to recover the bonds or their proceeds and to enjoin sale thereof by defendant. *Held,* for defendant, because the court is under a duty to give full faith and credit to the rulings of the Attorney General that one in the position of the defendant is the legal holder of such bonds. *Griffiths v. Hamblen Nat. Bank,* 86 S. W. (2d) 1099 (Tenn. Ct. App. 1935), *cert. denied,* Tenn. Sup. Ct., Oct. 12, 1935.

The instant case involved two interesting points. Registered bonds are ordinarily not transferable by delivery alone;[2] and those issued to complainant bore on their face no words of negotiability. Nevertheless a prior ruling of the Attorney General of the United States had established a rule that such bonds assigned in blank should be treated as though payable to bearer.[3] While the validity of such a conclusion rests solely upon rules and regulations of the Treasury Department[4] adopted by virtue of a very broad empowering statute[5] no question of inability to issue such a regulation was raised. Practical reasons of policy support the result, among them the frequent use of Liberty Bonds as collateral—a use which any other solution would hinder if not destroy. As respects the second point, however, the court's interpretation of the term "full faith and credit" was unfortunate. The application of this clause has been restricted to matters involving states, and has not been considered conclusive as to the effect a state should give federal action. A ruling of the Attorney General is not within the literal province of the constitutional section or of the case-law exposition of its meaning. Too much fault should not be found with the court, however, for a misuse of legal terminology, in view of the sensible solution reached. By virtue of the assignment in blank, the bonds were payable to defendant insofar as the Treasury was concerned. Even if the court had seen fit to grant complainant's prayer and had issued a suitable decree, its process could not have compelled federal recognition of the validity of complainant's claim.

Constitutional Law—Regulation of Trade or Business—Constitutionality of National Labor Relations Act—The National Labor Relations Act[1] provides *inter alia* that proceedings may be instituted against any employer who

1. The taking of a false acknowledgment to complainant's signature was expressly declared unimportant because defendant bank could have acquired "equitable rights to the bonds upon the faith of the owner's indorsement in blank." Instant case at 1101.

2. *In re* Stockham's Estate, 193 Iowa 823, 186 N. W. 650 (1922); *In re* Bliss v. Bliss, 221 Mass. 201, 109 N. E. 148 (1915); see Benwell and Everitt v. Newark, 55 N. J. Eq. 260, 263, 36 Atl. 668, 669 (1897).

3. 34 OPS. ATT'Y GEN. 262 (1924).

4. ". . . Registered bonds assigned in blank, or bearing assignments for exchange for coupon bonds which do not restrict delivery, are in effect payable to bearer and lack the protection of registration, since title thereto may pass by delivery without further assignment." Treasury Circular #300, paragraph 32, extract #12, paragraph 5 (July 31, 1923). See Opinion of the Attorney General appended to instant case, at 1102.

5. 40 STAT. 288, § 1 (1917), as amended by 40 STAT. 502 (1918), and 40 STAT. 844 (1918), 31 U. S. C. A. § 752 (1927).

1. P. L. No. 198, 74th Cong., 1st Sess. (1935).

refuses to bargain collectively with employee-selected representatives.[2] Complainants, owners and operators of a small flour mill in Missouri, raised the issue of constitutionality in a bill to enjoin proceedings against them under the Act for refusal to bargain collectively. Complainants received wheat from, and shipped flour to adjacent states. *Held,* the entire Act is unconstitutional as an attempt by Congress to regulate transactions not directly affecting interstate commerce. *Majestic Flour Mills of Aurora v. National Labor Relations Board,* U. S. L. Week, Dec. 24, 1935, at 10 (W. D. Mo. 1935).

The government contended that complainants' conduct would arouse their employees' dissatisfaction; that this would increase the possibility of strikes; that strikes would reduce production; and that diminished output would obstruct interstate commerce.[3] Also advanced was the theory that the industrial relations here were part of a "stream of commerce."[4] The court disposed of the first contention by asserting that complainants' conduct did not fall within the regulatory power of Congress because it was not *directly* connected with interstate commerce;[5] the second was defeated by the rather meretricious argument that the mill stood between *two* streams—forming the terminus of a stream of incoming grain and the source of a stream of outgoing flour.[6] Considering the initial point, one may well conclude that the Act is no bolder effort to supervise affairs only indirectly affecting interstate commerce than many a previous statute was in its time.[7] Concerning the subsequent one, it should be remarked that Congress may regulate sales of cattle at the Chicago stockyards,[8] and of grain on that city's Board of Trade,[9] as transactions representing part of a "current of commerce among the states."[10] Extension of this doctrine to the facts of the instant case would scarcely constitute a headlong leap into socialism, especially since it has been repeatedly stated that Congress' power under the commerce clause[11] reaches

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2. Other things denounced as "unfair labor practices" are: (1) interference by employer with employees' right to organize; (2) employer's domination of, interference with, or financial support to any labor organization; (3) discrimination in regard to hire or tenure of employment or any term or condition of employment encouraging or discouraging membership in any labor organization; (4) discharge of an employee for filing charges or giving testimony under the Act. These are set out in § 8.

As to what practices—unfair as a practical matter—are permitted by the Act, see Note (1935) 35 COL. L. REV. 1098, 1100-1106.

3. This argument is embodied in the elaborate findings of fact in § 1 of the Act itself.

4. See Holmes, J., in Swift & Co. v. United States, 196 U. S. 375, 398 (1905); Ribble, *The "Current of Commerce:" A Note on the Commerce Clause and the National Industrial Recovery Act* (1934) 18 MINN. L. REV. 296.

5. Schechter Poultry Corp. v. United States, 295 U. S. 495, 542 *et seq.* (1935). But *cf.* Stafford v. Wallace, 258 U. S. 495, 521 (1922). See GAVIT, THE COMMERCE CLAUSE (1932) § 107, and especially § 88.

6. Further *dicta* by the court, in the form of a jeremiad bewailing the fact that the American workman "is dealt with by the Act as incompetent" or as a "recently emancipated slave", hardly merit being termed "arguments."

7. *E. g.,* The Steamer Daniel Ball v. United States, 10 Wall. 557 (1870) (licensing boat operating on intrastate river, but carrying goods destined to go out of state); Head Money Cases, 112 U. S. 580 (1884) (act of Congress requiring a per capita tax on immigrants to take care of them). But *cf.* Carey v. South Dakota, 250 U. S. 118 (1919); Missouri v. Holland, 252 U. S. 416 (1920) (the "migratory birds" cases). See pertinent discussion in GAVIT, THE COMMERCE CLAUSE (1932) 97. And that "directness" is a variable quantity, dependent largely on external circumstances, see Ribble, *supra* note 4, at 315.

8. Swift & Co. v. United States, 196 U. S. 375 (1905); *cf.* Tagg Bros. & Moorhead v. United States, 280 U. S. 420 (1930).

9. Chicago Board of Trade v. Olsen, 262 U. S. 1 (1923).

10. See note 4, *supra.*

11. U. S. CONST. Art. I, § 8, cl. 3.

any practice which *in the judgment of Congress itself*[12] tends to restrain or burden interstate commerce.[13] Moreover, a single act of remote effect often, upon widespread repetition, becomes a direct impediment, so that regulation of the latter may be accomplished only by control over the former.[14] Addition to the above considerations of the rapidly disappearing "presumption of constitutionality"[15] will demonstrate that the instant decision was not inevitable even under orthodox constitutional standards.[16] Besides, the Act could readily have been sustained by deciding merely that it was inapplicable to the situation under notice. In view of the helpless plight of individual or unorganized employees,[17] economic and social factors,[18] as well as purely legal principles, provide further reason for disagreement with the result of the present case.

Criminal Law—Husband and Wife—Liability under Non-Support Statute of Husband on Relief for Demanding Payment According to Work Done—Defendant, unemployed applicant for relief, was convicted under a penal statute providing for punishment of a husband who "unreasonably neglects or refuses to provide for the support" of his family.[1] The city Welfare Department required, as one of the conditions of receiving relief payments, that those on relief do work for the Department of Public Works on demand. Defendant consented to work only if paid a definite wage proportioned to the amount of work he did.[2] *Held,* conviction affirmed, because it did not compel "involuntary servitude" within the meaning of the Thirteenth Amendment to the Federal Constitution.[3] *Commonwealth v. Pouliot,* 198 N. E. 256 (Mass. 1935).

Like most non-support statutes, the Massachusetts one expressly qualified the husband's duty to work by a condition that the demands upon him be "reason-

12. See Stafford v. Wallace, 258 U. S. 495, 521 (1922); United Mine Workers v. Coronado Coal Co., 259 U. S. 344, 408 (1922); Texas & N. O. R. R. v. Brotherhood of Ry. & Steamship Clerks, 281 U. S. 548, 570 (1930).

13. *Cf., e. g.,* Interstate Commerce Commission v. Goodrich Transit Co., 224 U. S. 194 (1912); Wilson v. New, 243 U. S. 332 (1917); Ribble, *supra* note 4, at 312; GAVIT, *loc. cit. supra* note 7; see Note (1935) 35 COL. L. REV. 1072, 1075-1077.

14. United States v. Ferger, 250 U. S. 199 (1919) (forged bills of lading); Stern, *That Commerce Which Concerns More States than One* (1934) 47 HARV. L. REV. 1335, 1364, n. 125, 1365, n. 126.

15. See WILLOUGHBY, CONSTITUTIONAL LAW (2d ed. 1929) §§ 26, 27; Corwin, *Judicial Review in Action* (1926) 74 U. OF PA. L. REV. 639, 645.

16. But see Bamberger, *Is the National Labor Relations Act Unconstitutional?* (1935) 40 COM. L. J. 570.

17. *Cf.* the language of Taft, C. J., in Amercan Steel Foundries v. Tri-City Central Trades Council, 257 U. S. 184, 209 (1921); for expatiation on this, and lively general comment on the Act and its critics, see Address of J. Warren Madden, N. L. R. B. Release No. 42 (Dec. 5, 1935).

18. For an exhaustive presentation of the economic factors involved see Note (1935) 35 COL. L. REV. 1098, particularly 1124 *et seq.*; *cf.* Mason, *The Limits as to Effective Control of the Employer-Employee Relationship* (1936) 84 U. OF PA. L. REV. 277.

1. MASS. GEN. LAWS (Ter. ed. 1932) c. 273, § 1. Such statutes, known as "Lazy Husband Laws", are extremely common. For a table of their comparative provisions see 3 VERNIER, AMERICAN FAMILY LAWS (1935) 118 *et seq.*

2. Apparently, defendant's demand was simply that he be paid at some fixed rate, regardless of what it was. It seems reasonable to assume, however, that such payment at any reasonable rate would have amounted to more than the ordinary relief allowance. In the first eleven months of 1930, 55 Massachusetts municipalities applied for building permits representing an estimated aggregate value of $98,396,919 in public works. SPECIAL REPORT ON UNEMPLOYMENT, MASS. DEP'T OF LABOR (1931) 19.

3. U. S. CONST. Art. XIII, § 1. "Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States. . . ."

able." [4] No previous case under a similar statute has been found which attempted to define that elastic term, the closest analogy being a two-year-old Wisconsin case which decided that defendant's refusal to work on relief unless he was paid in cash, would not render him liable if he had refused in good faith, under an honest (not necessarily reasonable) belief that the conditions imposed by the relief board were "unjust or intolerable." [5] To be sure, that case purportedly turned on a definition of the term "wilful." [6] But even assuming that conviction under the non-support statute involved in the instant case, did not require a criminal intent, one may well object to the decision on the basis of the objective criterion of "reasonableness." This is a term, obviously, whose definition must be sought in fields not solely legal; it requires consideration as to whether it is a sound social policy which would require of one unemployed that in return for maintenance at a lower than subsistence level,[7] he submit unconditionally to any conditions of labor which the state in its mercy may impose.[8] That one so hapless as to belong among the millions of unemployed must, to avoid the status of a criminal, surrender the ordinary laborer's right to demand, not only a fair or decent wage, but even a wage proportioned to his labor, is a proposition few would sanction as regards a private employer.[9] Indeed, it is something like this which, under the name of "peonage", has long been recognized as unconstitutional under the Thirteenth Amendment.[10] Peonage to the state is equally unjustifiable.[11]

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4. *E. g.*, ARK. STAT. (Crawford & Moses, 1921) § 2596 ("without good cause"); WIS. STAT. (1931) §§ 351.30, 351.31 ("without just cause"); UNIF. DESERTION AND NON-SUPPORT ACT (1910) § 1 ("without just cause").

5. Zitlow v. State, 213 Wis. 493, 252 N. W. 358 (1934), 9 WIS. L. REV. 425. A conviction was affirmed, however, on the assumption that the jury must have found that defendant acted *mala fide*, and not in accordance with a *bona fide* labor dispute.

6. "Wilful" has been held in similar statutes to refer to an act done with "evil intent or legal malice." Brown v. State, 137 Wis. 543, 549, 119 N. W. 338, 340 (1909); *cf.* Page v. State, 160 Miss. 300, 303, 133 So. 216, 217 (1931).

7. The precise amount of relief payments to which defendant was entitled in the city of Holyoke in 1933, has not been found; but some light may be thrown on their probable generosity by the fact that the 229,792 persons on relief in Massachusetts during the first three months of 1931 received, from combined private and governmental sources, an average of $5,469,708 as relief. SPECIAL REPORT, U. S. CENSUS BUREAU (1932) 16, 25.

8. For the harmful economic and social effects of low wages not only on the individual laborer, but on all workers and on society as a whole, see PATTERSON AND SCHOLZ, ECONOMIC PROBLEMS OF MODERN LIFE (2d ed. 1931) 525-527. The desirability of paying prevailing wages on public works projects has been recognized not only by agencies for social research [*e. g.*, COLCORD, EMERGENCY WORK RELIEF (Russel Sage Foundation, 1932) 243], but even, apparently, by the legislature of Massachusetts. See MASS. GEN. LAWS (Ter. ed. 1932) c. 149, § 26, which requires payment of prevailing wage rates to laborers in the construction of public works. Such considerations as these are obviously relevant to the question of the "reasonableness" of defendant's demand in the instant case.

9. Such a requirement might, for example, destroy the well-established rights of striking, and of bargaining collectively.

10. Peonage is defined as a status or condition of compulsory service based on the servant's indebtedness to the master. Clyatt v. United States, 197 U. S. 207, 215 (1905); *cf.* Bailey v. Alabama, 219 U. S. 219 (1911), which held unconstitutional under the Thirteenth Amendment an Alabama statute declaring that a laborer's failure to perform a contract of labor should be deemed *"prima facie"* evidence that he had entered into the contract with a fraudulent intent, for which offense criminal punishment was provided. Holmes and Lauton, JJ., dissented.

11. See Zitlow v. State, 213 Wis. 493, 497, 252 N. W. 358, 360 (1934), cited note 4, *supra:* "The question really involved is whether a person, engaged in a dispute with his employer, based upon his contention, made in good faith, that the working conditions are unjust or intolerable, may express his objection or enforce his contention by refusing to work, without subjecting himself to the penalty imposed by this section. We see no difference in the

Landlord and Tenant—Term for Years—Rights of Defaulting Lessee under a Covenant to Renew or Pay for Improvements—Lessor and lessee mutually covenanted in a lease of land, that at the expiration thereof, the lessor should have the option either of renewal or of paying for improvements made by the lessee; at a price, in either event, to be fixed by arbitration in case of disagreement between the parties. Lessee's suit for damages for breach of this covenant was summarily dismissed because of arrears in the payment of rent. *Held,* reversing the court below, that there was nothing in the lease which made the covenant to renew or pay dependent on payment of the rent by the lessee. *Berry v. Stuyvesant,* N. Y. L. J., Nov. 26, 1935, at 1 (App. Div., 1st Dep't 1935).

In considering the instant case, it must perforce be assumed that the interpretation placed on the lease by the court was correct.[1] Dealing with the matter then as simply one of independence of covenants, there is ample authority to support the position that was taken.[2] But considering the problem as that of the right of the lessee to compel performance of the renewal clause on the part of the lessor when the lessee is in default in some other covenant, without resolving the matter into one of the independence of covenants, there is authority contrary to the result reached herein.[3] Such covenants for renewal are quite generally enforced,[4] though the possibility of this result being reached is decreased where, as in the instant case, there is provision made for arbitration to settle the renewal rental, since the courts will not ordinarily force a party to arbitrate.[5] Moreover, the lessor's option in the principal case constituted a further difficulty in the way of enforcement, for the courts are disinclined to enforce a contract which is in the alternative.[6] But there is authority which would, in an appropriate suit, force the

application of this question between the county and any other employer." "Excepticnal" services to the state are of course not within the ban of the Thirteenth Amendment. Robertson v. Baldwin, 165 U. S. 275 (1897) (deserting sailor); Butler v. Perry, 240 U. S. 328 (1916) (citizens' obligation to work on roads).

1. It is unfortunate that the court in its opinion saw fit to reproduce only those portions of the lease which dealt with the option and the method of arbitration in case of dispute, particularly in view of the court's assertion that "in all cases the lease is searched to determine the intent of the parties." Thus in Bates v. Johnston, 58 Hun 528, 12 N. Y. Supp. 403 (Sup. Ct.), *aff'd,* 126 N. Y. 681, 28 N. E. 249 (1890), the court came to the conclusion that covenants similar to those in the principal case, were dependent, because the lease further contained a provision for re-entry on breach of a covenant, in which case the lessors were to resume possession "as in their first and former estate." Though it is also true that a court will not imply a forfeiture of rights under a lease [Parsons v. Ball 205 Ky. 793, 266 S. W. 649 (1924)]; and will assist in avoiding a forfeiture. Giles v. Austin, 62 N. Y. 486 (1875).

2. Whitcomb v. Indianapolis Traction Co., 64 Ind. App. 605, 116 N. E. 444 (1917); Fergen v. Lyons, 162 Wis. 131, 155 N. W. 935 (1916). Similarly, effect is given to the parties' expression that the covenant for renewal shall be dependent on performance of other covenants. Swift v. Occidental Mining & Petroleum Co., 141 Cal. 161, 74 Pac. 700 (1903); Manchester Amusement Co. v. Connecticut, 80 N. H. 455, 119 A. 69 (1922).

3. Felder v. Hall Bros. Co., 151 Ark. 182, 235 S. W. 789 (1921) (action for unlawful detainer); Gannett v. Albree, 103 Mass. 372 (1869); Upton v. Hosmer, 70 N. H. 493, 49 Atl. 96 (1901). A search of the recent cases reveals only these few authorities directly on the point.

4. Hunter v. Silvers, 15 Ill. 174 (1853); Bergstein v. Bergquist, 152 Minn. 358, 189 N. W. 120 (1922); McClintock v. Joyner, 77 Miss. 678, 27 So. 837 (1900); Crawford v. Kastnor, 26 Hun 440 (N. Y. Sup. Ct. 1882).

5. Despite the general rule that an agreement to arbitrate will not be enforced in the absence of special circumstances, there is authority to the contrary where the covenant is mutually binding, as it was in the principal case. Johnson v. Conger, 14 Abb. Pr. 195 (N. Y. Sup. Ct. 1861); Faucett v. Northern Clay Co., 84 Wash. 382, 146 Pac. 857 (1915); see Holsman v. Abrams, 2 Duer 435, 446 (Super. Ct. N. Y. City, 1853).

6. Davis v. Isenstein, 257 Ill. 260, 100 N. E. 940 (1913); Safron v. David McBurney & Son, 269 Pa. 392, 112 Atl. 677 (1921).

lessor to decide between the two courses of action which were open to him.[7] Thus it is apparent that had the suit herein been to compel performance of this covenant, rather than for damages for its breach, the result might have been contrary to that actually reached in the case under consideration. Herein, the damages were likely to be slight, inasmuch as it appeared that lessee's improvements were negligible, as well as that there was no rental specified for the term of renewal.[8]

States—Debt Limitation—Application of Constitutional Debt Limitation to Obligations Payable from Special Fund—The Colorado legislature passed acts[1] providing that the highway department was authorized to receive from the federal government up to $25,000,000 for road construction; that a special highway fund would be created out of which the principal and interest on the advance would be paid; and that all future revenue from specified sources, including gasoline tax and automobile license fees, would be paid into the fund. The most that could be borrowed under the constitution was $100,000.[2] *Held,* that the act did not create a "debt" within the constitutional prohibition, because payment of the obligation could never place any burden on revenues available for appropriation to general state purposes.[3] *Johnson v. McDonald,* 49 P. (2d) 1017 (Colo. 1935).

It is well settled that if obligations are payable only from the revenue to be realized from the particular utility or property which has been acquired with the proceeds of the loan, they do not constitute "debts" within the meaning of a constitutional debt limitation.[4] The rationale of the rule is that such an obligation is never a general liability of the state. Examples of its application include cases of municipalities or states issuing bonds to finance the construction of electric light plants,[5] water works,[6] canals,[7] and bridges,[8] the obligation to be paid solely from charges and tolls collected. But dissents have been expressed in recent cases where the doctrine has been extended, as in the instant case, to provide for a vast indebtedness payable from what would otherwise be a major source of revenue for general purposes.[9] The court in the instant case reasoned,

7. Smith v. Rector of St. Philip's Church, 107 N. Y. 610, 14 N. E. 825 (1888); see Holsman v. Abrams, 2 Duer 435, 446 (N. Y. 1853); Columbia University v. Kalvin, 250 N. Y. 469, 474, 166 N. E. 169, 171 (1929). Moreover, in the lease in the principal case there was a provision that if the lessor did not renew the lease, he would pay for the improvements.

8. The lessor's valuation of the improvements is mentioned in the report. On the measure of damages, as being the difference between the agreed rental and the value at date of the breach, see Indian Head Mills v. Hamilton, 212 Ala. 97, 101 So. 747 (1924); Freiheit v. Broch, 98 Conn. 166, 118 Atl. 828 (1922); Stern Co. v. Friedman, 229 Mich. 623, 201 N. W. 961 (1925).

1. Colo. Laws 1935, c. 124, p. 462; c. 181, p. 941.

2. COLO. CONST. art. XI, §§ 3, 4.

3. Plaintiff attacked the constitutionality of the act on nine grounds, of which the one under discussion was of principal importance. None of the plaintiff's contentions was upheld.

4. California Toll Bridge Authority v. Kelly, 218 Cal. 7, 21 P. (2d) 425 (1933). See cases cited *infra,* 5 to 8.

5. Shields v. Loveland, 74 Colo. 27, 218 Pac. 913 (1923).

6. Seward v. Bowers, 37 N. M. 385, 24 P. (2d) 253 (1933).

7. *In re* Canal Certificates, 19 Colo. 63, 34 Pac. 274 (1893).

8. Alabama State Bridge Corp. v. Smith, 217 Ala. 311, 116 So. 695 (1928).

9. Instant case at 1032; State *ex rel.* Boynton v. State Highway Comm., 138 Kan. 913, 28 P. (2d) 770 (1934); Moses v. Meier, 148 Ore. 185, 35 P. (2d) 981 (1934); Briggs v. Greenville County, 137 S. C. 288, 135 S. E. 153 (1926); *cf. In re* Senate Resolution No. 2, 94 Colo. 101, 31 P. (2d) 325 (1933).

however, that the facts fell within the general rule.[10] The extended special fund doctrine has been upheld by other courts on the ground that the debts referred to in the limitation are debts to be paid only from a general property tax.[11] The force of the latter argument, however, is spent, for the general property tax is no longer the principal source of revenue.[12] Moreover, the purpose of the constitutional limitation is to keep states substantially on a cash basis, and to prohibit the pledge of future fixed revenues, so that one legislature cannot paralyze the next by devouring revenues otherwise available to both.[13] If the extended construction of the special fund doctrine, as adopted in the instant case, is generally accepted, the efficacy of the debt limitation will be destroyed; for it is conceivable that all sources of future revenue could be designated to make up special funds and pledged to pay for present expenditures.[14]

Suretyship—Rights and Remedies of Surety—Priority over Materialmen When Payment of Full Penalty on Bond Only Partially Satisfied Claims of Materialmen—Contractor properly completed work for the United States, but failed to pay materialmen as required by his contract with the government. Claimant, surety on the bond given to protect the United States and the materialmen,[1] paid the penalty on the bond upon the contractor's bankruptcy, and the money was ratably distributed to the materialmen, still leaving a balance due from the contractor. Claimant asserted that, by subrogation to the rights of contractor and by virtue of an indemnity contract [2] executed by contractor prior to the date of the bond, it was entitled to priority in a fund representing retained percentages [3] paid by the government to the contractor's trustee. *Held* (Roberts, J., dissenting [4]), that the materialmen should prevail over the surety, because a surety is not entitled to subrogation until the principal's obligation is fully performed, and because the rights of the materialmen cannot be cut off by a contract between the surety and his principal. *American Surety Co. v. Westinghouse Elec. Mfg. Co.*, 56 Sup. Ct. 9 (1935).

As was pointed out in a previous issue of this REVIEW,[5] these facts presented no reason for an exception to the general rule that a surety has an equitable right

10. See instant case at 1025.

11. See State *ex rel.* Boynton v. State Highway Comm., 138 Kan. 913, 916, 28 P. (2d) 770, 772 (1934); Briggs v. Greenville County, 137 S. C. 288, 301, 135 S. E. 153, 157 (1926).

12. See U. S. CENSUS, FINANCIAL STATISTICS OF STATES (1929) 13: "The general property tax is the principle source of revenue from 1915 to 1922, inclusive, but for subsequent years it is exceeded by receipts from business and non-business taxes." The report indicates the varying degree to which states depend on the general property tax for revenue. Pennsylvania and North Carolina reported no receipts from the general property tax in 1929.

13. See People *ex rel.* Seeley v. May, 9 Colo. 80, 95, 10 Pac. 641, 649 (1886); *In re* Senate Resolution No. 2, 94 Colo. 101, 119, 31 P. (2d) 325, 332 (1933).

14. See Crick v. Rash, 190 Ky. 820, 836, 229 S. W. 63, 70 (1921).

1. Such a bond is required by 33 STAT. 811 (1905), 40 U. S. C. A. § 270 (1928) (the "Heard Act").

2. The contract provided that, if contractor's breach should make it necessary for surety to pay, surety should be subrogated to contractor's rights for any sum due on the contract, including "deferred payments."

3. Part of the price was held back by the government under the contract until the work had been completed. This fund was insufficient to satisfy both surety and materialmen.

4. Mr. Justice Roberts dissented on the ground that the fund should be turned into the general assets of the bankrupt, and that neither of the parties should be allowed priority. The majority opinion refused to consider the rights of other creditors, on the ground that the record failed to show the existence of any other creditors.

5. (1935) 83 U. OF PA. L. REV. 1034.

to be subrogated to the rights in the principal's creditors only after the creditors have been paid in full.[6] In the light of the purpose of the bond, the Court's holding as to the effect of the contract for indemnity was not only correct but meritorious.[7]

Taxation—Manufacturer's Tax—Fair Market Price as Based on Sales by Manufacturer to Wholly Owned Subsidiary—Plaintiff, manufacturer of perfumes, owned all shares in sales corporation which handled manufacturer's products. Plaintiff sold products to sales corporation at cost plus ten per cent, plus one and one-half per cent, plus tax. A Federal statute [1] places a tax on articles of the type manufactured by plaintiff corporation amounting to ten per cent of the "fair market price" of the product. The statute also provides that, "If any article is sold [otherwise than through an arm's length transaction] at less than the fair market price, the tax shall . . . be computed on the price for which such articles are sold, in ordinary course of trade by manufacturers or producers thereof as determined by the commissioner." [2] Plaintiff sued to recover taxes paid. *Held,* that the sales to the sales corporation were not at the fair market price, that the transaction was not at arm's length, and that the commissioner had therefore properly computed the tax on the basis of the price received by sales corporation in sales to the trade. *Bourjois, Inc. v. McGowan,* U. S. L. Week, Dec. 3, 1935, at 8 (W. D. N. Y. 1935).

Under the statute the commissioner's determination of the "fair market price" was limited to the situation where (1) the manufacturer sold the article at less than the fair market price, and (2) the transaction was not at "arm's length." Ordinarily the fair market price is that price charged for the article or similar articles in the open market.[3] Where, however, the article is of a special or peculiar nature, the fair market price is that charged by the individual controlling its sale in the open market.[4] Plaintiff corporation in the instant case manufactured an article sold under a particular brand name,[5] and therefore largely controlled its price. If the plaintiff corporation be regarded as one engaged solely in the manufacture of its product and not in the distribution of it, the fair market price would be that charged by it in its sales to the sales corporation.[6] If, however, the plaintiff corporation be regarded as not only a manufacturing corporation but also one engaged in the distribution of the manufactured product—a process involving attendant costs of advertising, sales promotion, *etc.* —the fair market price would seem to be that price received in sales to the trade. The ultimate inquiry, therefore, is concerned with the question of the identity between the plaintiff corporation and its solely-owned subsidiary sales corporation. It has been held that ordinarily the corporate entity will not be disregarded in tax

6. Jenkins v. National Surety Co. 277 U. S. 258 (1928).

7. In the words of Justice Cardozo: "Equity then forbids that the statutory security be whittled down indirectly by any promise of indemnity, general or specific." Instant case at 12.

1. Revenue Act, 1932, § 603, 26 U. S. C. A., c. 20, n. (Supp. 1935).

2. Revenue Act, 1932, § 619 (b) (3), 26 U. S. C. A., c. 20, n. (Supp. 1935).

3. Poppenberg v. Owen & Co., 84 Misc. 126, 146 N. Y. Supp. 478 (Sup. Ct. 1914), *aff'd,* 221 N. Y. 569, 116 N. E. 1070 (1917).

4. *Ibid.*

5. Plaintiff corporation manufactured "Bourjois" and "Barbara Gould" cosmetics, both of which were well-advertised and were sold on the basis of the goodwill generated by the names "Bourjois" and "Barbara Gould."

6. Witnesses for the plaintiff corporation testified that manufacturers of similar products received cost plus ten per cent, plus one and one-half per cent, in sales to sales corporations. It would seem that this would be a fair market price in sales by manufacturers alone, not distributing their products.

matters.[7] Moreover, the fact that a corporation has been formed with the motive to escape taxation is said to be immaterial.[8] However, the courts have been astute either to sustain or to disregard the corporate entity depending on which attitude was necessary to prevent tax evasion.[9] In the instant case, therefore, it is not surprising that the court disregarded the separate entity of the solely-owned sales corporation and held that in reality the plaintiff corporation was engaged not only in the manufacturing but also in the distribution of its product.[10] That the transaction was not at "arm's length" is obvious in view of the close affiliation between plaintiff corporation and the sales subsidiary. The decision achieves the result probably intended to flow from the operation of the statute:[11] prevention of tax-dodging by the use of the familiar device of the dummy or subsidiary corporation.

Workmen's Compensation Acts—Construction—Attorney as Employee within Meaning of Compensation Act—Plaintiff was an attorney employed by defendant on a monthly retainer. He maintained an independent office, where he engaged in the active practice of his profession. While returning to his office after a conference with defendant's officers concerning defendant's affairs, plaintiff was injured. He brought suit under the local Workmen's Compensation Act, which defined "employee" as including "Every person in the service of any person . . . under any contract of hire, express or implied. . . ."[1] *Held,* that plaintiff was an employee of defendant within the meaning of the statute. *Skaggs Co. v. Nixon,* 50 P. (2d) 55 (Colo. 1935).

At common law, the employment of a physician[2] or nurse[3] to render professional services in specific instances did not create the relationship of master and servant; the employer was not liable to a third party for the malpractice of the person engaged. Likewise, an attorney retained to handle designated legal matters was not treated as an ordinary employee.[4] Under Workmen's Compensation Acts,

7. Burnet v. Commonwealth Improvement Co., 287 U. S. 415 (1932); Burnet v. Clark, 287 U. S. 410 (1932); Old Colony Trust Co. v. Commissioner of Internal Revenue, 69 F. (2d) 699 (C. C. A. 1st, 1934).

8. "The question always is whether the transaction under scrutiny is in fact what it appears to be in form." L. Hand, J., in Chisholm v. Commissioner of Internal Revenue, 79 F. (2d) 14 (C. C. A. 2d, 1935); see Eaton v. White, 70 F. (2d) 449, 451 (C. C. A. 1st, 1934).

9. Cases upholding the corporate entity: Burnet v. Commonwealth Improvement Co., 287 U. S. 415 (1932); Burnet v. Clark, 287 U. S. 410 (1932); Old Colony Trust Co. v. Commissioner of Internal Revenue, 69 F. (2d) 699 (C. C. A. 1st, 1934); New Colonial Ice Co. v. Commissioner of Internal Revenue, 66 F. (2d) 480 (C. C. A. 2d, 1933); see *In re* Collin, 75 F. (2d) 62, 64 (C. C. A. 8th, 1934). Cases disregarding the corporate entity: Gregory v. Helvering, 293 U. S. 465 (1934); Bass v. Hawley, 62 F. (2d) 721 (C. C. A. 5th, 1933); *cf.* Met. Holding Co. v. Snyder, 79 F. (2d) 263 (C. C. A. 8th, 1935).

10. Officers of plaintiff corporation were officers of the sales corporation. The court concluded that plaintiff corporation dictated the price received by sales corporation in sales to the trade.

11. Revenue Act, 1932, § 619 (b) (3), 26 U. S. C. A., c. 20, n. (1935).

1. Colo. Laws 1931, c. 175, § 1, amending Colo. Laws 1927, c. 197, § 2.

2. York v. Chicago, *etc.,* Ry., 98 Iowa 544, 67 N. W. 574 (1896); Pearl v. West End St. Ry., 176 Mass. 177, 57 N. E. 339 (1900); Schloendorff v. Society of New York Hospital, 211 N. Y. 125, 105 N. E. 92 (1914); MOLL, INDEPENDENT CONTRACTORS (1910) § 38 (k).

3. Parkes v. Seasongood, 152 Fed. 583 (C. C. D. R. I. 1907); MOLL, INDEPENDENT CONTRACTORS (1910) § 38 (k); see Schloendorff v. Society of New York Hospital, 211 N. Y. 125, 132, 105 N. E. 92, 94 (1914); *cf.* Phillips v. Buffalo Gen. Hospital, 239 N. Y. 188, 146 N. E. 199 (1924) (hospital orderly).

4. A statute or court order directing the receiver of an insolvent debtor to prefer the wage claims of employees has been held not applicable to an attorney's charges for professional services. Louisville, *etc.,* R. R. v. Wilson, 138 U. S. 501 (1891); Lewis v. Fisher, 80 Md.

also, nurses [5] and physicians [6] engaged for isolated cases are not "employees" entitled to relief, but "independent contractors." However, where the services are continuous, and the person rendering them devotes his practice exclusively to a single employer for a periodic stipend, the mere fact that he is a member of a "profession" does not change his status as an employee.[7] A contract whereby a lawyer engages to handle all the legal business of another party for a stipulated recompense at stated intervals, though free to carry on an independent practice, falls between these two extremes. Such agreement, at common law, has not been considered as making the attorney an employee for certain purposes.[8] Apparently, the only previous case which determined the legal effect of such a contract under a Workmen's Compensation Act was *Industrial Com. v. Moynihan*,[9] also decided by the Colorado Supreme Court, which reached the same result as the instant case. The *Moynihan* decision was based upon the employer's right to control, as indicated by his right to terminate the relationship at any time without liability. The general rule is that a client is not liable for damages for breaching a contract to employ an attorney,[10] though at least one court has recognized an exception where the agreement calls for a periodic general retainer, such as existed in the instant case. It has sometimes been pointed out that the policy of such legislation is to grant relief to *workmen*. On this theory it has been held that it would be incongruous to permit recovery by executives, as distinguished from "employees", as that term is applied in common speech.[12] Such a distinction seems unwarranted by the statutory definition of "employee"; it would be preferable to determine whether the relationship of master and servant exists by application of the accepted tests [13] to the contract in question.

139, 30 Atl. 608 (1894); People v. Remington & Sons, 45 Hun 329 (N. Y. Sup. Ct. 1887), *aff'd*, 109 N. Y. 631, 16 N. E. 680 (1888). *Contra:* Gurney v. Atlantic & G. W. Ry., 58 N. Y. 358 (1874). Likewise, statutes imposing upon stockholders liability for wages due laborers and employees, do not include debts due attorneys for professional services, even though the attorney receives a fixed salary. Bristor v. Smith, 158 N. Y. 157, 53 N. E. 42 (1899); Bristor v. Kretz, 22 Misc. 55, 49 N. Y. Supp. 404 (Sup. Ct. 1897); 6 THOMPSON, CORPORATIONS (3d ed. 1927) § 4877.

5. Moody v. Industrial Acc. Comm., 204 Cal. 668, 269 Pac. 542 (1928); Matter of Renouf v. New York Central R. R., 254 N. Y. 349, 173 N. E. 218 (1930); Matter of Brown v. St. Vincent's Hospital, 222 App. Div. 402, 226 N. Y. Supp. 317 (3d Dep't 1928); SAMPSON, WORKMEN'S COMPENSATION (1915) 14. *Contra:* Williamson v. St. Catherine's Hospital, 2 Cal. Ind. Acc. Comm. 448 (1915).

6. Murphy v. Enniscorthy Board of Guardians, 42 Ir. L. T. 246 (1908); SAMPSON, WORKMEN'S COMPENSATION (1915) 15.

7. Matter of Bernstein v. Beth Israel Hospital, 236 N. Y. 268, 140 N. E. 694 (1923) (interne); Getzlaff v. Enloe, 3 Cal. Ind. Acc. Comm. 18 (1916) (physician); Visiting Nurse Ass'n v. Industrial Comm., 195 Wis. 159, 217 N. W. 646 (1928) (nurse) *semble*.

8. Thus, an attorney injured while riding on his client's public vehicle was permitted to recover under a policy insuring "passengers", the court holding that he was not an employee. United States Casualty Co. v. Ellison, 65 Colo. 252, 176 Pac. 279 (1918). See also note 4, *supra*. But see Greenberg v. Remick & Co., 230 N. Y. 70, 75, 129 N. E. 211, 212 (1920).

9. 94 Colo. 438, 32 P. (2d) 802 (1934); *cf.* Getzlaff v. Enloe, 3 Cal. Ind. Acc. Comm. 18 (1916) (physician under a similar type of contract permitted to recover under Workmen's Compensation Act).

10. See authorities collected in 19 ANN. CAS. 592 (1911).

11. Greenberg v. Remick & Co., 230 N. Y. 70, 129 N. E. 211 (1920).

12. Donaldson v. Donaldson Co., 176 Minn. 422, 223 N. W. 772 (1929); Matter of Bowne v. Bowne Co., 221 N. Y. 28, 116 N. E. 364 (1917); Carville v. Bornot & Co., 288 Pa. 104, 135 Atl. 652 (1927). But *cf. In re* Raynes, 66 Ind. App. 321, 118 N. E. 387 (1917); Matter of Skouitchi v. Chic Cloak & Suit Co., 230 N. Y. 296, 130 N. E. 299 (1920).

13. The right of "master" to control "servant" (including the right to dismiss); the right of "master" to direct the methods adopted by "servant"; control of premises by "master"; absence of an independent business maintained by "servant"; *etc.*